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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/811,695	03/29/2004	Mark James Kline	9595	1368

27752 7590 12/22/2006
THE PROCTER & GAMBLE COMPANY
INTELLECTUAL PROPERTY DIVISION
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EXAMINER

BOGART, MICHAEL G

ART UNIT	PAPER NUMBER
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3761

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	12/22/2006	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary

Application No.

10/811,695

Applicant(s)

KLINE ET AL.

Examiner

Michael G. Bogart

Art Unit

3761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 02 October 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 29 March 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-20 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 3 and 5-20 of copending Application No. 10/811,696. Although the conflicting claims are not identical, they are not patentably distinct from each other because the '696 application teaches every element of the instant invention except for a second stretch region. Mere duplication of parts is not sufficient to patentably distinguish an invention over the prior art. See *In re Harza*, 274 F.2d 669, 124 USPQ 378 (CCPA 1960)

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections – 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. § 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

Claims 1-4, 7-9, 11, 19 and 20 rejected under 35 U.S.C. § 102(b) as being anticipated by Drobin *et al.* (US 5,571,096 A; hereinafter “Drobin”).

Drobin teaches a unitary disposable absorbent article (20), comprising:
an absorbent core (28) having a garment-facing surface and a body-facing surface;
a liquid permeable topsheet (24) positioned adjacent said body-facing surface of said absorbent core (28);

a liquid impermeable backsheet (26) positioned adjacent said garment-facing surface of said absorbent core (28); said backsheet (26) having a physical variation along at least one axis, wherein said physical variation defines a first backsheet zone (82) and a second backsheet zone (80), wherein said physical variation is a measurable difference, wherein said physical variation is as measured by a physical property selected from the group consisting of basis weight, thickness, density and tensile modulus; at least one elastomeric element (34) having at least one primary direction of stretch, said elastomeric element (34) at least partially overlapping and joined to said second backsheet zone (80)(col. 13, lines 1-8, incorporating by reference U.S. Pat. No. 4,515,595 to Kievet *et al.*, which discloses an elastomeric element which extends across the entire transverse width of the waist portions);

a first stretch region (44) having lateral stretch; and

a second stretch region (46) having lateral stretch; wherein said first stretch region is capable of co-elongating with said second stretch region (see figure 2, *infra*). The limitation concerning the co-stretchability of the elastic elements is functional. An apparatus claim must be structurally distinguishable over the prior art. MPEP § 2114.

Drobin teaches that the apertures may be formed by cutting holes out of a film without forming cones, such that the apertures will have a caliper the same as the film thickness, which necessarily means that some material will be removed from the film leaving it with a decreased density and basis weight (col. 9, lines 28-30). The result is that the unperforated portion (82) of the backsheet (26) has a greater basis weight and density than the perforated portions (80).

Regarding claim 2, Dobrin teaches that the waist elastics (34) are attached in an elastically contractible condition (col. 10, line 63-col. 11, line 19; incorporating by reference Buell *et al.* (US 5,330,458)).

Regarding claim 3, the first stretch region (44) includes second backsheet (76) zone.

Regarding claim 4, second stretch region (46) includes at least one ear (30).

Regarding claim 7, Dobrin teaches that the axis is a lateral axis.

Regarding claim 8, Dobrin teaches a front waist region (46) back waist region (44), a crotch region (48) a buttocks region (rear portion of crotch (48)) near rear waist region (44); said first backsheet zone (74) being primarily located in said crotch and front waist region (46), wherein the second backsheet zone (76) is located partially in the back waist region (44).

Regarding claim 9, Dobrin teaches a front waist region (46) back waist region (44), a crotch region (48) a buttocks region (rear portion of crotch (48)) near rear waist region (44);

said first backsheet zone (74) being primarily located in said crotch and front waist region (46), wherein the second backsheet zone (76) is located partially in the buttocks region.

Regarding claim 11, the second backsheet zone (76) has a lower basis weight and density that the first backsheet zone (74).

Regarding claims 19 and 20, Dobrin teaches a diaper/pant.

Art Unit: 3761

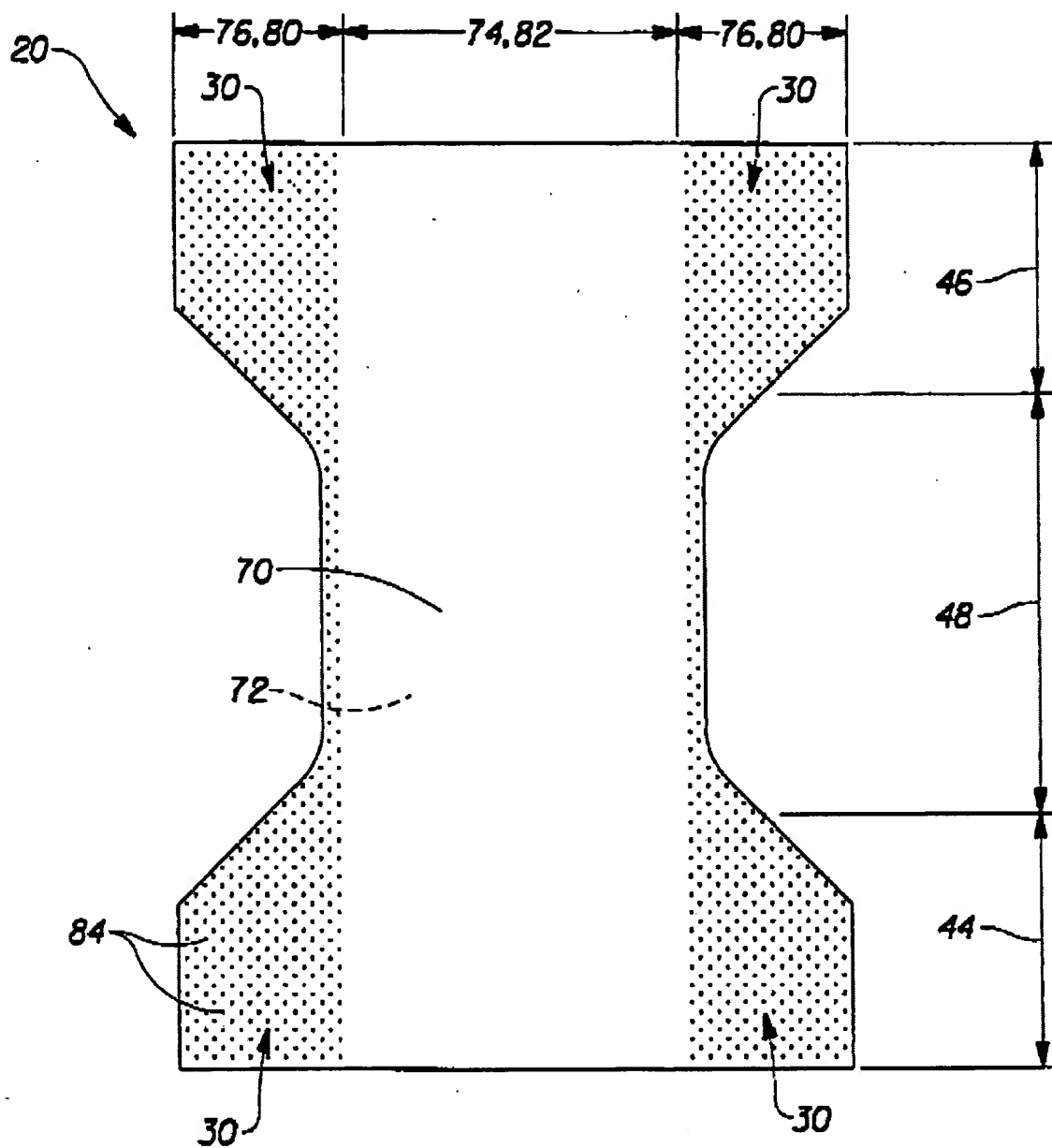


Fig. 2

Claims 1, 5, 6, 10, 14 and 16-18 are rejected under 35 U.S.C. § 102(b) as being anticipated by Roe *et al.* (US 2002/0128617 A1; hereinafter "Roe").

Roe teaches a unitary disposable absorbent article (20), comprising:

an absorbent core (28) having a garment-facing surface and a body-facing surface;

a liquid permeable topsheet (24) positioned adjacent said body-facing surface of said absorbent core (28);

a liquid impermeable backsheet (26) positioned adjacent said garment-facing surface of said absorbent core (28); said backsheet (26) having a physical variation along at least one axis, wherein said physical variation defines a first backsheet zone (34) and a second backsheet zone (crotch region), wherein said physical variation is a measurable difference, wherein said physical variation is as measured by a physical property selected from the group consisting of basis weight, thickness, density and tensile modulus; at least one elastomeric element (54) having at least one primary direction of stretch, said elastomeric element (54) at least partially overlapping and joined to said second backsheet zone;

a first stretch region (34) having lateral stretch; and

a second stretch region (43) having lateral stretch; wherein said first stretch region is capable of co-elongating with said second stretch region (see figure 1, *infra*).

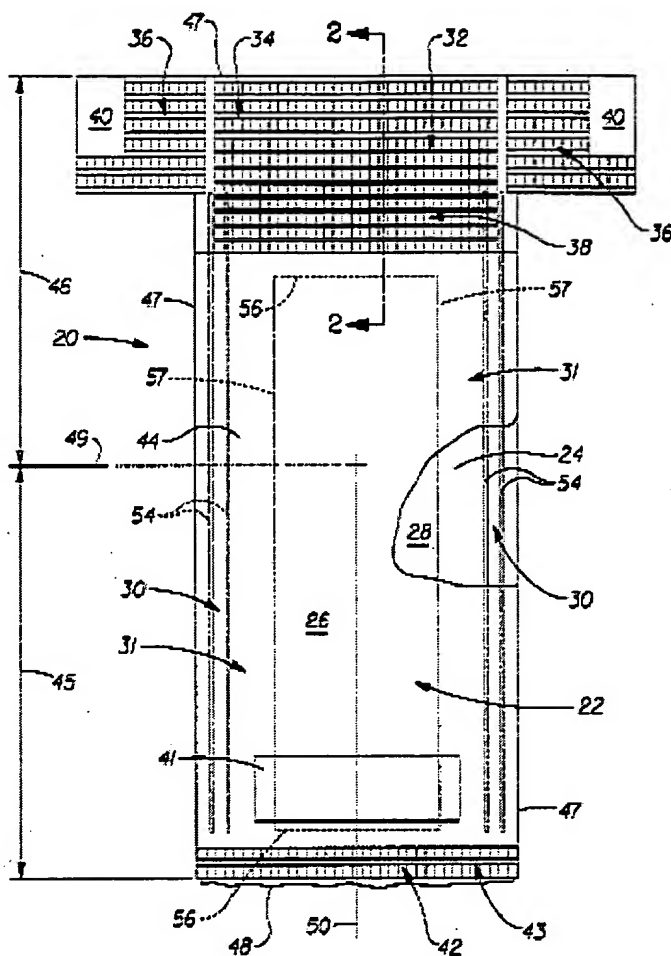


Fig. 1

The limitation concerning the co-stretchability of the elastic elements is functional. An apparatus claim must be structurally distinguishable over the prior art. MPEP § 2114.

Zones (32) and the backsheet at the central crotch region differ in their tensile modulus.

Regarding claim 5, the axis is longitudinal.

Regarding claim 6, (34) and the crotch portion overlap the longitudinal axis.

Regarding claim 10, the elastic member is curved in use as the diaper conforms to a wearer.

Regarding claims 14 and 16, Roe teaches a third backsheet zone (38) having a different value than the other backsheet zone (34) and the crotch portion such that its extension forces are less than that of (32) but greater than that of the crotch region.

Regarding claim 17 and 18, Roe teaches multiple elastic elements that contact third backsheet zone (54). They curve to conform to a wearer during use.

Claim Rejections – 35 USC § 103

The following is a quotation of 35 U.S.C. § 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. § 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. § 103(c) and potential 35 U.S.C. § 102(e), (f) or (g) prior art under 35 U.S.C. § 103(a).

Claims 12, 13, and 15 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Roe.

Roe does not teach the specific ratio of basis weights of the backsheet zones or the ration of the relaxed length of the absorbent element to that of the backsheet.

Generally, differences in ranges of parameters will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration or temperature is critical. “[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation.” *In re Aller*, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955).

A particular parameter must first be recognized as a result-effective variable, i.e., a variable which achieves a recognized result, before the determination of the optimum or workable ranges of said variable might be characterized as routine experimentation. *In re Antonie*, 559 F.2d 618, 195 USPQ 6 (CCPA 1977).

In the instant case, one of ordinary skill in the art would have recognized the benefits of optimizing the basis weight of various layers or the stretch characteristics of the elastic element as they affect how an absorbent article will fit on a wearer.

Response to Arguments

Applicant's arguments filed 02 October 2006 have been fully considered but they are not persuasive.

Applicants assert that the provisional rejection for double patenting should be withdrawn because both applications were filed on the same day.

This argument is not persuasive because the provisional double patenting rejection shall remain in effect until a terminal disclaimer is filed, the claims are amended to overcome this rejection, or that is the only remaining rejection in the application. The double patenting

Art Unit: 3761

rejection is not a prior art rejection under 35 USC §§ 102 or 103, it is to prevent multiple patents from issuing for the same invention. The fact that the applications were filed on the same day does not avoid the provisional double patenting rejection.

“If both applications are filed on the same day, the examiner should determine which application claims the base invention and which application claims the improvement (added limitations). The ODP rejection in the base application can be withdrawn without a terminal disclaimer, while the ODP rejection in the improvement application cannot be withdrawn without a terminal disclaimer.” MPEP § 804 I. (B) 1.

Applicants assert that Dobrin’s zones (80, 82) vary only in vapor permeability, not basis weight or density. This argument is not persuasive because Dobrin teaches that the apertures may be formed by cutting holes out of a film without forming cones, such that the apertures will have a caliper the same as the film thickness, which necessarily means that some material will be removed from the film leaving it with a decreased density and basis weight (col. 9, lines 28-30). Additionally, Dobrin at col. 9, line 41, incorporates by reference Radel *et al.* U.S. Pat. No. 4,342,314 which at fig. 12 clearly shows a film with apertures that result in a lower basis weight film than a film without such apertures. The result is that in the device of Dobrin, the unperforated portion (82) of the backsheet (26) has a greater basis weight and density than the perforated portions (80).

In response to applicant’s argument that “configured to elongate” is a structural limitation, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the

Art Unit: 3761

claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

Applicants assert that Roe does not teach zones with a different tensile modulus. This argument is not persuasive because Roe expressly teaches that topsheet/backsheet zones (34) and (43) have different stretch and extension properties that the rest of the topsheet/backsheet (paragraphs 0009 and 0046). Regarding the definition of “tensile modulus”, it is interpreted herein as meaning: The measure of the initial resistance of a material to longitudinal stretching. See e.g., *Materials by Design: Elastic Modulus*, Cornell University, 1996. Applicants have not specifically defined “tensile modulus” to have a meaning other than this, as such, the claims are given their broadest reasonable interpretation. MPEP § 2111.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event,

however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael Bogart whose telephone number is (571) 272-4933.

In the event the examiner is not available, the Examiner's supervisor, Tatyana Zalukaeva may be reached at phone number (571) 272-1115. The fax phone number for the organization where this application or proceeding is assigned is (571) 273-8300 for formal communications. For informal communications, the direct fax to the Examiner is (571) 273-4933.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (571) 272-3700.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Michael Bogart
15 December 2006

TATYANA ZALUKAEVA
SUPERVISORY PRIMARY EXAMINER

